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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court No. ..... 73 - 995

Court of Appeals No. 73 1542

JERROLD B. SHERMAN,
Petitioner,

vs

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, by Carl Ziemba, his attorney, respectfully prays this Court issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment entered against petitioner in that Court.

1. ORDERS BELOW

The order of the United States Court of Appeals for the Sixth Circuit affirming petitioner's conviction was entered October 16, 1973, and the Order of the Court denying petitioner's petition for rehearing and suggestion for hearing en banc was entered November 16, 1973. Neither Order has officially been reported; they appear as Appendix A and B, *infra*, pp 17, 18.

2. JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 16, 1973. An order of the Court denying petitioner's petition for rehearing and suggestion for hearing en banc was entered on November 16, 1973. The jurisdiction of this Court is invoked under Title 28 USC § 1254(1).

3. QUESTIONS PRESENTED

The question presented by this petition is:

Was petitioner deprived of a fair trial and due process under the Fifth Amendment to the Constitution of the United States because of the following:

(A) the United States Attorney repeatedly emphasized to the jury that petitioner did not pay any income taxes for two years whereas petitioner was charged with failure to file income tax returns for two years; and he repeatedly stated to the jury his personal belief in the guilt of petitioner;

(B) the government introduced evidence which suggested that petitioner cheated his partner and stole money from a client trust account and evaded payment of his taxes.

4. CONSTITUTIONAL PROVISION INVOLVED

The Due Process clause of the Fifth Amendment to the Constitution of the United States is set forth in Appendix C, *infra*, p 19.

5. STATEMENT OF THE CASE

Defendant below, petitioner here, was charged in a two count information. The first count charged that defendant had a gross income $11,682 during the calender year of 1967 and that he willfully and knowingly failed to file an income tax return on or before April 15, 1968. The second count charged that defendant had a gross income of $14,708 in calender year 1968 and that he willfully and knowingly failed to file an income tax return on or before April 15, 1969.

Defendant and the government stipulated to the following facts: that defendant was a person who was required by law to file an income tax return for the calender years 1967 and 1968, he having in each of those years an income in excess of $600, and that no income tax return as required was filed in either year. This stipulation was read to the jury as part of the government's case, and the court adverted to this stipulation in his charge to the jury and admonished the jury that the facts included in the stipulation must be regarded by them as proved.

The government and defendant in their summations to the jury recognized that the sole question in the law suit was that of the willfullness of defendant's not filing the said returns, and the court also recognized this as the sole question to be decided in his charge to the jury.

During the years in question, defendant was a practicing attorney and he was in partnership with one Jerrold Friedman who died in November, 1970.

To prove the element of willfullness, the government introduced into evidence oral statements made by defendant to government agents who were investigating the matter and Gov Exh #2 which was a written question and answer statement given by defendant to a government agent.

The defendant did not testify.

Defendant moved the court for a judgment of acquittal at the conclusion of the government's case. This motion was denied. Defendant renewed his motion at the end of all proofs. This motion was denied.

The jury returned a verdict of guilty against defendant on each of the two counts.

Defendant moved the court for a judgment of acquittal under Rule 29(c) and he moved the court for a new trial under Rule 33. Both motions were denied.

Defendant was sentenced to one year in prison on each of the two counts with the sentences to run concurrently, execution of sentence to be suspended except for the first 4 months to be followed by probation for 2 years with a special condition of probation that defendant pay $1,000 on each of the two counts for a total of $2,000.

Defendant filed his appeal as a matter of right in timely fashion.

6. REASONS FOR GRANTING THE WRIT

A

THE UNITED STATES ATTORNEY PREJUDICED THE JURY BY REPEATEDLY STATING THAT PETITIONER DID NOT PAY TAXES FOR TWO YEARS WHEREAS PETITIONER WAS CHARGED WITH FAILURE TO FILE RETURNS; AND BY EXPRESSING HIS BELIEF IN THE GUILT OF PETITIONER.

The writ should be granted because petitioner was deprived of a fair trial when the United States Attorney made the following statements to the jury:

In his opening statement:

(1) "... and in this opening statement I will tell you in a very brief and general way *how I intend to prove the guilt of the defendant,* Jerrold B. Sherman."

(2) "And I say that, I preface my remarks with that by stating this: That the Internal Revenue Service has certain procedures whereby a taxpayer, a defendant, can come before it and explain or give in mitigation or *give some evidence of why he feels that this is not a criminal case; that he shouldn't be charged with it.* There are conferences before the Intelligence Division, which Mr. Judge represents. There is a conference before the attorney in Cincinnati, the Regional Counsel, a lawyer for the Internal Revenue Service, where a taxpayer can come in if he so desires and give evidence of why he thinks he is not guilty. And there is another conference in the Department of Justice in Washington where he can once again go."

(3) "As far as the criminal matter is concerned, we are only talking about the individual income tax returns that were not filed by the defendant. *Of course, in those two years no returns were filed and no taxes were paid on that income tax return of the defendant.* It is important to note, I think, that we are not here to collect taxes. This is a criminal trial."

In his summation:

(4) "The type of case we have here, ladies and gentlemen, is not a crime of violence and I often, you know, when picking juries wonder just how jurors feel about this type of crime, because it is difficult to pinpoint victims as you would in a crime of violence or narcotics or something of that nature. *In this type of case, essentially, we are all victims, ladies and gentlemen, because we have here a man who did not file tax returns for a couple of years and to this date has not filed those taxes.*"

(5) "There were numerous attempts to get in touch with him after that, and there is some testimony from Mr. McNeils—and I say that facetiously—*that he may have been away on vacation. He may well have been. If you don't pay taxes, ladies and gentlemen, you may take a pretty good vacation.*"

(6) "*He is not going to forget it, ladies and gentlemen, because it just never happend, I say, concerning the 1968.* Now, he may have gone to Mr. Friedman, as this lady stated today—I have forgotten her name —and asked him to prepare those returns. *But I wonder why Mr. Friedman didn't file them.* He

filed his own on time. He filed the partnership return on time. *Maybe the information he brought down there was inaccurate. The defendant admitted the 1967 was inaccurate. Maybe Mr. Friedman said, 'I know that is inaccurate. I know you had more income.' There are a lot of things that could have happened as to why they were not filed."*

(7) *"I know why they don't file in the first place. generally. For two years you don't pay any taxes. Wouldn't we all love to have a couple years where we don't pay any taxes. We have evidence that he was driving a Lincoln, going on vacations. He lives in Birmingham. And he was at a new office building out in Southfield somewhere. Two years, ladies and gentlemen, and not a penny of taxes."*

(8) "We do live in a wonderful country, ladies and gentlemen. There are a lot of wasted taxes that we all contribute to. *This defendant, I submit, has had a couple of years of paying no taxes."*

(9) *"The defendant is guilty and I ask that you render a verdict of guilty against the defendant for both years."*

(10) "The defense always puts responsibility on everyone else but the defendant. The responsibility was put on Mr. Friedman and on us. *I submit, ladies and gentlemen, that the guilty party here is the defendant. Mr. Friedman is not on trial."*

(11) "The intent, ladies and gentlemen, is to the years 1967 and 1968. I am glad the defendant bumped into Mr. Witus in 1969 and got his return filed. *Two years without payment of taxes, ladies and gentlemen. Why does a person do it?"*

The holding in the lower Court in the case at bar is in direct conflict with the holding of the same court in *United States* v *Signer* (CA6 1973) 482 F2d 394.

In that case, the defendant was charged with income tax evasion. The court held to be plain error the following remark by the United States Attorney to the jury in summation:

> "I like political cartoons, and I hope you won't consider it humorous because I don't think it's humorous; I think it illustrates the point, if I show you a cartoon for the Last Century Cleveland, which was the New York Tribune, and it was to get a lot of money of New York—
>
> Mr. Lynch: May I see that first.
>
> Mr. Milligan: Go right ahead, take a look.
>
> "Who stole the people's money;" They have a ring, everyone pointing to the man next to him.
>
> "Who took the money from the Ringgold? Was it Graff? Was it Guilfoyle? Was it Signer?" (p 399 of the opinion.)

In holding the remark to be plain error and reversible, the court said:

> "As before stated, Signer was on trial for income tax exasion only, and it was not proper to attempt to try him for something else; nor is it proper to appeal to the passions and prejudices of the jurors. Cincinnati is well known as a buildng and loan center, with a large number of associations doing business in the city, which associations without a doubt had many depositors. The depicting of Signer as a thief looting a building and loan association, could not help but prejudice him in the eyes of the jury." (p 400 of the opnion.)

In *United States* v *Walker* (CA9 1973), 479 F2d 407, where the defendant was charged with failure to file income tax returns for two years, the court held it to be error for the government to introduce evidence of the increase in net worth of the defendant of $248,241 because it would prejudice a jury in a failure to file case.

The case at bar is not different.

Petitioner was fatally prejudiced by the United States Attorney's remarks that he had not paid taxes for two years whereas the members of the jury did pay taxes.

And in *United States* v *D'Anna* (CA2 1971), 450 F2d 1201 where the prosecution was for income tax evasion, the Court condemned the tactic of the government attorney's twice asking the members of the jury to consider the fact that they as citizens carry an additional burden when someone does not pay his taxes, the Court stating that the government attorney should not be permitted to indulge in oratorical flights that seriously endanger a defendant's right to a fair trial.

And in *Dunn* v *United States* (CA5 1962), 307 F2d 833, 855, the Court held:

> "In the instant case "zeal outran fairness" in our judgment. At the outset, the jury was told that in the prosecutor's opinion the case was the most flagrant he had ever tried and was replete with fraud. . . . It is improper for counsel to express his personal opinion or to state facts of his own knowledge, not in evidence, and not part of the evidence to be presented; or to make unwarranted inferences or insinuations calculated to prejudice the defendant."

The zeal of the government attorney in the case at bar outran fairness. The cumulative effect of the remarks of the government attorney complained of created an atmosphere most prejudicial to defendant.

A succession of objections would have served no purpose except to draw more close attention to the improper remarks. As was said in *Dunn, supra,*

> "In every case involving improper argument of counsel, we are confronted with relativity and the degree to which such conduct may have affected the substantial rights of the defendant. It is better to follow the rules than to try to undo what has been done. Otherwise stated, one 'cannot unring a bell'; 'after the trust of the saber it is difficult to say forget the wound'; and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it'." 307 F2d at 886.

B

THE GOVERNMENT PREJUDICED THE JURY WITH EVIDENCE SUGGESTING THAT PETITIONER CHEATED HIS PARTNER AND STOLE MONEY FROM A CLIENT TRUST ACCOUNT AND EVADED PAYMENT OF HIS TAXES.

The writ should be granted because the government elicited the following prejudicial testimony from government witnesses which suggested that defendant had a nefarious source of income, that he evaded taxes, that he cheated his partner and that he stole money from a client trust fund.

The government introduced this testimony from Robert J. Bednarczyk, an Interval Revenue agent:

> Q. Now, did you have any further discussion on that date, do you remember?

A. Yes, sir. Mr. Sherman's 1969 tax return had been prepared by an accountant by the name of Ray Witus and that showed income other than that from the law partnership of Friedman and Sherman, and I asked Mr. Sherman about this particular income and I also asked him about it on the September 4 meeting and he stated to me that this income was received from certain individuals that wished to remain anonymous and did not want it to be known the amounts paid him.

I tried to pursue the matter and he stated that these were from consulting fees. I still pursued the matter and asked what if I called this speculation income and if he wanted to call it speculation income and he didn't answer my question.

From Peter Judge, Special Agent with the Intelligence Division of IRS, the government attorney elicited this testimony:

Q. (By Mr. Pritchard): Did you make inquiry into other income at this time with the defendant?

A. Yes, I did. I asked him if he had other income in the years '67-'68, other than what he had earned through the partnership. Mr. Sherman responded that he had but he refused to give me the—well, if I remember correctly, he didn't know the figure of income for each year and when I asked him who he received this income from he refused to give me that information.

From Patricia Mals, the government attorney elicited this testimony:

Q. To your knowledge did the firm owe the defendant any money in 1967?

A. No. It did not. I know it didn't. Mr. Sherman owed the partnership money.

Q. Excuse me?

A. Mr. Sherman owed the partnership money.

Q. How do you know that?

A. He had drawn some money from the clients' trust account and I told Mr. Friedman about it and he arranged for Mr. Sherman to pay it back a little at a time and it wasn't paid back at the time I left.

Q. From the Clients' trust account?

A. Yes.

Q. *Do you know what he did with this money?*

A. *Not really. He had very heavy expenses.*

Mr. McNelis: Objection, your Honor. She either does or does not know.

The Court: Yes. I will sustain the objection.

Q. (By Mr. Pritchard): To your knowledge, Mrs. Mals, did Mr. Friedman owe any money to the firm?

A. No.

Q. *Do you remember the type of automobile the defendant drove in 1967?*

A. I think he had a Lincoln Continental at that time.

• • • • •

Re-Direct Examination
by Mr. Pritchard

Q. Mrs. Mals, you indicated when you left in November, 1967, that the defendant still owed a trust account money; is that correct?

A. Yes.

Q. *Do you remember how much money was taken from the trust account?*

Mr. McNeils: Objection, your Honor, I don't see any relevancy as to the amount.

• • • • •

Q. You mentioned the trust account. Is that a separate account?

A. Yes, it is.

Q. Now, how did you learn that the defendant had taken money from the trust account?

A. I balanced the check books and in doing so I saw the checks Mr. Sherman had drawn to his own account.

Q. Now, was this brought to Mr. Friedman's attention?

A. Yes.

Q. By you?

A. Yes.

Q. Did there come a time when you, Mr. Friedman, and the defendant discussed this?

A. Yes.

Q. And were arrangments made to pay back this trust account?

A. Yes. Mr. Sherman agreed to pay back a certain amount out of the equal draw, out of his share.

The Court: I beg your pardon?

A. Mr. Sherman agreed to pay back a part of his draw back into the trust account.

Q. (By Mr. Pritchard) Now, this clients' trust account, do you remember the client or was it a corporation?

A. It's just all the clients' trust account. It was not a certain client's trust account.

Mr. McNelis: I don't hear you. I am sorry.

A. It was not a certain client's trust account. It was just a general clients' trust account.

The Court: They had a general clients' trust account?

A. Yes.

Q. (By Mr. Pritchard): So we understand what you are talking about, in a clients' trust account, whose money is that?

A. Belongs to the clients and to the firm—the partnership. Fees and everything from the trial would come out of that account and the rest would go to the client.

Whether defendant had income over and apart from income which he received from his law partnership was completely immaterial to the issues of the law suit as was the question from whom he received the income.

This testimony elicited by the government has the odor of a deliberate attempt to suggest to the jury by innuendo that defendant had a source of illicit income or that he was dishonestly hiding partnership income from his partner or that he was hiding details of his income from the government—or for that matter, all three.

It is plain to see from the record that the purpose in the government's eliciting such testimony from Mrs. Mals was to prejudice the defendant in the eyes of the jury by suggesting that he was a common sneak thief who stole money from his clients behind the back of his partner and who was brought to book by the vigilance of the office secretary. For what other reason did the government attorney so painstakingly establish with Mrs. Mals that defendant's alleged indebtedness to the partnership grew out of defendant's drawing checks on a trust account which contained money which belonged to clients and that defendant was made to pay these sums back. For what purpose did the

government attorney elicit from Mrs. Mals testimony that at that time defendant drove a Lincoln Continental and for what purpose did he ask whether Mrs. Mals knew what defendant did with the money he obtained from the trust account is it was not for the purpose of deliberately prejudicing defendant's case?

It was the duty of the trial judge to keep immaterial and irrelevant evidence out of the record especially when ladened with prejudical content. Although there were no objections from the defendant to most of the above testimony, its admission in evidence should be regarded by this Court as plain error under *Rule 52 (b) FRCP* because of the prejudice wrought by it.

This is not a case in which evidence of defendant's guilt is overwhelming. The issue of defendant's guilt is an extremely close one. This can be discerned from the colloquy between the court and government counsel on defendant's motion for a judgment of acquittal upon close of the government's case.

Because of the closeness of the factual issues, the cumulative effect of the errors defendant complains of emerges as the controlling element in the case. Because of the deeply prejudicial nature of the cumulative effect of these errors, this defendant was deprived of a fair trial.

In this connection, the case of *Baines* v *United States* (CA5 1970), 426 F2d 833, should be carefully noted. There the charge was that of willful evasion of payment of federal cabaret sales excise tax. The Court considered a number of alleged errors made at trial level including one concerning the charge of the court to the jury to which no objection was made. The Court, in reversing, said:

> "Because of the closeness of the case the Court feels completed to hold, as we held in Marcus v

United States, 5 Cir 1970, 422 F2d 752, "that the cumulative effect of the District Court's errors, which are discussed in detail below, when taken together, require that this case be reversed and remanded to the District Court for a new trial, *even though no single error, when reviewed in isolation, would necessarily require this disposition.*" At p 835 (Emphasis added.)

• • • • •

"Although the record indicates that there is evidence from which a jury could find the defendant guilty, it is not this Court's function to determine the accused's guilt or innocence." At p 841.

• • • • •

"We have concluded, after a careful study of the record, that the cumulative effect of the district court's errors and near-errors requires that a case as close as this case involving a cabaret tax be reversed and remanded for a new trial." At p 842.

7. CONCLUSION

For the reasons given, petitioner prays this Court issue a Writ of Certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATE COURT OF APPEALS FOR THE SIXTH CIRCUIT

United States of America,
Plaintiff-Appellee,
v
Jerrold B. Sherman,
Defendant-Appellant.

Order

ORDER

Before: Phillips, Chief Judge, and Celebrezze and Miller, Circuit Judges.

This is an appeal from the convictions of the appellant, Sherman, by a jury on two counts of an information, charging wilful failure to file income tax returns for the years 1967 and 1968 in violation of Sec. 7203 of the Internal Revenue Code.

On appeal, the appellant insists that the convictions should be reversed because, first, the prosecutor committed plain error in his opening remarks to the jury; second, that the court itself committed plain error in its instructions to the jury; and third, that error was committed in the admission of unduly prejudicial testimony.

We have carefully examined the record and find the contentions of the appellant to be unsubstantiated. We hold that the trial of the appellant on the two counts of the information was free from error.

It is therefore Ordered and Adjudged that the convictions of the appellants and the judgments of the district court implementing the said convictions be and the same are hereby affirmed.

Entered by Order of the Court

/s/James A. Higgins
Clerk

APPENDIX B

ORDER

(United States Court of Appeals for the Sixth Circuit)

Before: Phillips, Chief Judge, and Celebrezze and Miller, Circuit Judges.

On October 24, 1973, defendant-appellant, Jerrold B. Sherman, filed in this action a petition for rehearing with suggestion for rehearing en banc.

It appearing that no judge of the Court has voted for a rehearing en banc and the panel having considered the petition for rehearing and having reached the conclusion that the said petition is without merit;

It is therefore Ordered and Adjudged that the said petition for rehearing and suggestion for rehearing en banc be denied.

Entered by Order of the Court

/s/James A. Higgins
Clerk

APPENDIX C

Amendment 5

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.